United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1274

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-1274

UNITED STATES OF AMERICA,

Appellee,

-against-

JOSEPH METZGER,

Appellant.

On Appeal from the United States District Court
Southern District of New York

APPELLANT'S BRIEF

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AUTHORITIES

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BRIEF FOR APPELLANT JOSEPH METZGER

STATEMENT OF THE ISSUES

Whether the relevant evidence was sufficient, as a matter of law, to establish appellant's guilt, beyond a reasonable doubt.

STATEMENT OF THE CASE

This is an appeal from appellant's conviction, after trial by a jury in the United States District Court for the Southern District of New York, Honorable Milton Pollack presiding, of four of the counts of the Indictment. Each of the Counts charged appellant with willful misapplication of bank funds in violation of Title 18 U.S.C. Section 656.

Appellant was named, along with several other defendants in a multi-count Indictment. Only 21 counts related to appellant.

The proceedings against appellant were severed from those against the other defendants and he was tried alone. Because many of the charges were almost identical, the government, at the Court's suggestion, elected to try only ten counts, namely Counts 39, 40, 41, 42, 53, 55, 74, 77, 119 and 120. Appellant was acquitted by the jury on all but four counts. They were counts 40, 41, 42 and 77.

Appellant was also tried on a six count information, one count of which charged him with conspiring to receive gifts, fees or commissions for procuring loans and the other five with having received such gifts, fees or commissions on five separate occasions. He was acquitted of all of these charges.

On June 2, 1976, appellant was sentenced to three years in prison on each count, the sentences to run concurrently.

On June 2, 1976, appellant filed a notice of appeal to this Court from the judgment of conviction and sentence.

STATEMENT OF THE FACTS

From 1961 when he graduated college until 1968, with the exception of a period of service in the army, appellant

was employed by the Meadowbrook National Bank. In 1968 when that bank merged with the National Bank of North America ("NBNA") he became an employee of that bank until 1973. (R.1170-1173). * Commencing in 1966, he worked in the Marine Department, (R.1172) initially as an assistant to the head of that department (R.1173) and, then as an officer in that department. (R.55). He functioned as a lending officer, processing loan applications for ship owners. (R.55,893). During 1971 and the relevant portion of 1972, the Ship Loan Department was headed by Gregory Spartalis, a Vice-President (R.55,893). Spartalis was assisted by another officer named John Shevlin (R.55,893). The department was largely divided into two parts, with Spartalis and Shevlin handling one group of clients and appellant handling another (R.952).

Appellant was assisted by a secretary named Ann Mylonas (R.1149). Spartalis' secretary was Martha Kwiatkowski (R.1062) who was the only person in the department able to type (R.1062). In addition, Joel Heine was an administrative assistant in the department. (R.316).

There were two types of loans processed by the department - long term ship mortgage loans and short term loans, sometimes unsecured, but generally secured in some fashion. The ship mortgage loans were invariably presented to a loan

*References with "R" are to transcript pages.
References with "A" are to appendix pages.

committee which consisted, among others, of the three officers of the ship loan department, including appellant, and Gerald Bachman, a Senior Vice-President of the bank (R.63).

The short term loans, on the other hand, with one or two exceptions, were never submitted to the loan committee for approval. (R.107,108,728,729). In many, if not most, cases the failure to submit these short term loans to the loan committee, apparently violated bank policy as set forth in a document entitled "Rules Governing Extension of Credit" which was identified by Bachman. That memorandum provided that no lending officer was to approve a loan which either alone or when aggregated with all other direct and contingent obligations of the borrower, was in excess of an assigned lending limit, without first obtaining the approval of the loan committee (Ex.3A). According to the testimony of Bachman, the Senior Vice-President, that memorandum was supposed to be distributed to all officers. (R.693). In fact, however, he did not know whether such distribution had been effected (A.38, 39) or whether appellant had ever received a copy of the memorandum. (A.38, 39) . Appellant stated unequivocally that he never received it. (A.25) . Moreover, appellant testified that Spartalis, his superior, had specifically authorized him to approve loans, without

submission to the loan committee, on a short term basis for working capital or emergency purposes. (R.1290,1296). In fact, short term loans had never been submitted to the loan committee for approval. This was attested to not only by appellant (R.1296,1297), but by Shevlin, the other officer in the department, who was called as a government witness. (A.50, 51).

In connection with the processing of a ship mortgage loan, the lending officer would prepare or cause to be prepared a Loan Offering Sheet and a Loan Fact Sheet (R.62). These sheets contained various items of information concerning the proposed loan and the borrower, including thepurpose of the loan, the identity of the ship which was to be security for the loan including, if applicable, the identity of the company which was chartering the vessel and the aggregate of loans then outstanding to the borrower or its affiliates or with respect to which the borrower was contingently liable. (R.62).

In the case of short term loans, only a Loan Offering Sheet was prepared which identified the borrower, the security for the loan, if any, and the outstanding obligations.

In numerous cases, the Loan Offering Shee s which were used to process short term loans wit hout approval of the loan committee, indicated on their faces that the outstanding loans to the borrower were so large that any additional loan would have been theoretically beyond the authority of the lending officer. (Ex.1A,1C,6A,AE,BA,BB,CQ,CS,CV,CW,CY,DC,DD,DE,DF).

Each month a listing of all long term loans as well as a listing of all short term loans of the ship loan division were circulated. (A.60 Ex.D). These lists would have indicated to anyone familiar with the ship loan committee, including Mr. Bachman, that short term loans were being processed in the ship loan division without loan committee approval although apparently beyond the lending officers authority. Although Bachman did not recall seeing these lists, both appellant and his secretary, Ms. Mylonas testified that on at least one occasion Bachman reviewed certain loans on the sheet with appellant. (A.61, 62; 66, 67).

During the course of each year, there were three separate reviews conducted of the activities of the ship loan department, including one by Federal bank examiners. (A. 40, 41, 42). All bank records were available to the reviewers including the various Loan Offering Sheets for a particular borrower which revealed that the Ship Loan Department never complied with any requirement that lending officers obtain approval for short

term loans from the loan committee if the aggregating borrowings exceeded any amount.

The four counts on which appellant was convicted involve one ship mortgage loan in June, 1972 and three short term loans in July, 1972 which were approved by appellant. The ship mortgage loan, in the amount of $3,300,000 was submitted to and approved by the loan committee. The three short term loans, two in the amount of $125,000 each and one in the amount of $115,000 were made, without loan committee approval
At the trial, the prosecution contended that appellant had committed certain willful improprieties in connection with these loans evidencing appellant's intent to defraud or injure NBNA. Those alleged improprieties and appellant's positions with respect to them are as follows:

As to the Ship Mortgage Loan

1. That appellant knew that the borrower which was allegedly a corporation whose stock was owned by Mark Scufalos, a customer whose account had in the past been handled by appellant, was in fact Tidal Marine Corporation, a customerof the bank to which it had been determined by the loan committee that no further loans would be made.

Appellant denies that he knew the real owner of the vessel was Tidal and contends there is no evidence to contradict him. On the contrary, the evidence indicates that Scufalos signed a certificate at the closing, certifying that he was the sole stockholder of the owning corporation.

2. Appellant intentionally misstated on the loan offering sheet the amount of outstanding obligations of affiliated corporations since the offering sheet omitted in the total outstanding loans, a ship mortgage loan of $5,500,000 which that same loan committee had approved four months earlier.

Appellant contends that the omission was an inadvertent error committed by Ms. Kwiatkowski who admitted it at the trial. This alleged false statement was the basis for the charge in Count 74 that appellant had submitted a false statement to the bank. Appellant was acquitted of that charge.

3. Appellant permitted a charterer to be substituted for the one identified on the loan offering sheet without getting prior approval from either the loan committee or a superior officer.

Appellant contents that he did everything possible to insure that there was a valid charter and that he did get the approval of Mr. Bachman and Spartalis.

4. Appellant knew and failed to advise the loan committee that Tidal Marine Corp. which was going to be the operator of the ship, had previously obtained a ship mortgage on the basis of a charter which turned out to be non-existent.

Appellant contends that he knew only that there had been some unidentified problem with a prior charter, that the matter was being handled by Spartalis, his superior, who told him it was being taken care of, and that he had reported his knowledge to the attorney for the bank who had handled that loan, and that any problems with Tidal had nothing to do with Scufalos.

As to the Short Term Loans

1. That Appellant did not have the authority to approve them because they exceeded his lending limit.

Appellant contends that the officers in the ship loan department were not subject to any limitation on their lending limits on the authority of the head of that department.

2. That the loan was really for Tidal of which appellant was aware and that Tidal's financial condition was so poor that a loan was not warranted.

Appellant denies that the loan was for Tidal or if it was that he knew it.

In order to understand fully the charges of which appellant was convicted, some discussion is necessary of the prior relationships between the principals and of the charges

of which appellant was acquitted.

Prior to July 1971, Tidal had borrowed approximately $10,000,000 on ship loan mortgages from NBNA. In ~~July~~ 1971, it was determined at a loan committee meeting that any future requests for loans would be carefully examined (R. 70,71, 696, 697). The reason for this, according to Mr. Bachman was because the bank did not want to put too many financial eggs in one basket (~~R. 696, 697~~). The Tidal account at NBNA was handled by Spartalis and Shevlin (R. 345).

Several months earlier, Tidal had purchased some ships from one or more corporations controlled by Mark Scufalos (R.205, 207). Title was not conveyed to all of the ships, however, pending full payment. (R.249). Mark Scufalos was a customer of NBNA whose account was handled by Metzger. (R. 1159) Scufalos was a graduate of the New York Merchant Marine Academy, (R.238) where one of his classmates was Paul Friedman, an attorney with the firm of Cole & Dietz, general counsel to NBNA (R. 238). Paul Friedman was also the son-in-law of Sidney Friedman, Chairman of the Board of NBNA (R.239). Paul Friedman introduced Scufalos to appellant and recommended that Scufalos become a bank customer. (R. 240). Scufalos had been a bank customer since 1967 and in the period

1969 to 1971 had borrowed money on prior occasions and the loans were repaid on time and without any problem. (R.1178, 1179).

In June 1971, Scufalos and Harry Amanatides, President of Tidal agreed, in order to procure funds to proceed with the purchase of Scufalos' ships, that Scufalos would seek a loan from NBNA on six of the ships which were subjects of the sale but were still owned by his companies, ostensibly for the purpose of buying out his partners (R.212, 213). In fact, the proceeds of the loan would be paid to Scufalos and his partners as the purchase price for the vessels. (R. 251). Scufalos was instructed by Amanatides to meet with appellant to seek the loan and to tell appellant, if he asked, that the ships were chartered to Transoceanic Steamship Co. (R.213,214,253), a company apparently owned by Amanatides and his partner Ian Livas, although this fact is not very clear. Scufalos did meet with appellant, told him the story as he was instructed by Amanatides and eventually a loan was granted. (R.158,216). It was the prosecution's contention that appellant knew that this loan was not truly being made to Scufalos' companies. This transaction was not the basis for any charge in the Indictment probably because Scufalos, at the trial,

in an interview with officials of the bank and presumably at the U.S. Attorneys office admitted that he had told appellant only that he was borrowing the money for the purpose of buying out his partners.

The procedure generally followed by the bank in obtaining payment on ship mortgage loans, including this one, was to procure an assignment of the charter hire on the vessel. (R. 64). Charter hire payments were forwarded directly to the bank and credited to the customer's account (R.65). Thereafter, each month, 1/3 of the quarterly installment payment due was transferred from the customers checking account to a Cash Collateral Account which was then charged quarterly for the installment due. (R.65, 66). The first quarterly payment was due in November, 1971 (R. 81). Only a portion of it was available (R. 81). Appellant testified that he communicated with Scufalos' office in Greece and was advised that charter payments had inadvertently been sent to the corporation's bank account in London and that the situation would shortly be cleared up. (A. 63 - 65). A 30 day loan of $242,000 secured by the charter hire, was requested in order to satisfy the installment payment. (A. 65). This loan was approved

by appellant in accordance with procedures in the Ship Loan Department, without loan committee approval, but with the approval of appellant's superior, Spartalis (A. 65).

In early November, 1971, another loan to the Scufalos group was approved by the loan committee based upon appellant's recommendation. This loan in the amount of $1,700,000 was also used to pay a portion of the purchase price to the Scufalos group although this was not revealed. The loan was secured by a ship mortgage and an assignment of charter hire. The charterer was again Transoceanic Steamship Co. (Ex. 33). There was no evidence to indicate that appellant knew that these were not Scufalos' ships. This transaction was also not used as the basis for a charge in the indictment.

The eight ships involved in these two loan transactions were dry cargo ships which were owned and operated by Scufalos' companies up to the dates of the loan closings and continued to be operated by Scufalos' companies thereafter. (R. 223).

In December 1971, a loan of $5,500,000 to Scufalos corporations was approved by the loan committee for the purchase of two tankers named the Tropis and the Tekton (R.77).

In connection with this loan, appellant submitted a loan offering sheet which contained two entries which the prosecution contended were false. Each alleged false statement was the basis for one Count of the Indictment. (Counts 53 and 55). One entry was the figure for outstanding loans which was erroneously set forth as $3,025,000 and failed to include the $1,700,000 loan which had been made in November, 1971 a few weeks earlier (R.77). Ms. Kwiatkowski, Spartalis' secretary, who did all of the typing, accepted full responsibility for this error and testified that it resulted from the fact that she had used the October, 1971 list of long term loans to get her figures because the offering sheet was prepared before the November, 1971 list had arrived. (R.1075).

The prosecution also contended that the offering sheet falsely stated that Scufalos "has always lived up to his obligations here at NBNA" when appellant knew that a 30 day short term loan of $242,000 had been used to pay the November, 1971 installment on the August, 1971 loan for the six dry-cargo vessels. Appellant explained that since his prior experience with Scufalos for four years had been free of

any problems and since he had no reason to doubt the explanation by Scufalos' manager that the failure to meet the payment as scheduled was due to an error, he did not feel that this one delay of 30 days was a basis for concluding that Scufalos had failed to live up to his obligations. The jury acquitted appellant on both of these Counts.

In connection with this loan, Shevlin testified that Amanatides had offered to pay him, Spartalis and appellant a large sum of money for processing the loan. (A. 43). Only he and Spartalis were actually present when Amanatides made the proposal. (A. 43). Shevlin says that he communicated the proposal to appellant. (A. 44, 45). Shevlin said that he was not asked to do anything improper with respect to the loan and that he did not ask Metzger to do anything improper. He affirmed that they would not approve the loan unless it was a good one. (A.56, 57, 58, 59). When he advised appellant of the promised payment, Shevlin said nothing more than that a payment would be forthcoming. (A. 58). He did not, in any way, indicate that anything would have to be done to earn the payment.

Shevlin further testified that thereafter, on five separate occasions, over a two or three month period, each of he and appellant received a total of $45,000. (R.906-912). Appellant denied Shevlin's story unequivocally (R.1373), and there was testimony by the attorney who handled the closing for the bank, that the closing almost aborted because appellant would not proceed without a pledge of the corporate borrower's stock until he was overruled by Spartalis, his superior. (R.618-624). Martin also testified that over strong objection by borrower's counsel, 1/2 of the loan proceeds was held in escrow until a problem with the registration of one of the vessels was cleared up. (R.627-629). The jury, obviously disbelieving Shevlin, acquitted appellant on Counts 2, 3, 4, 5 and 6, each of which charged receipt of one of the five payments described by Shevlin and Count 1, the conspiracy count.

Between August, 1971 and June, 1972, 29 short term loans were made to various subsidiaries or affiliates of Tidal (Ex.153). None of these loans was submitted to the loan committee for approval. Of the 29 loans, 16

represented renewals of prior loans. Appellant's signature appeared on the loan offering sheet on 17 occasions, 9 of which contained the signatures also of Shevlin and Spartalis as the approving officer. Of the eight others, four consisted of the original loan and renewals to one company. The proceeds of those loans which were not used for renewals of prior loans, were ultimately used in some cases to pay wholly or partially the installments due on long term loans (Ex.54), although that fact does not appear on the loan offering sheets. The transfers from the borrowing corporations to the cash collateral accounts of the corporations indebted on long term loans was effectuated by Shevlin or Heine the administrative assistant on the basis of transfer requests, transmitted to either Shevlin or Heine by personnel at Tidal. (Ex. EO,EQ,ER,ES). There was no evidence to indicate any knowledge by appellant of the use to which these funds were put or were intended to be put.

Three of these loans were the basis of charges in the indictment that appellant misapplied bank funds by approving these loans without allegedly required loan committee approval. Appellant was acquitted on each of these counts.

In April, 1972, a loan of $3,200,000 was recommended by appellant and approved by the loan committee. (R. 77).

The loan actually closed in June, 1972.(Ex. 150). Appellant was charged in Count 77 of the indictment with willful misapplication of bank funds in connection with this loan and was found guilty of that charge by the jury.

The evidence with respect to this loan established that appellant was advised in April, 1972 by Spartalis, his superior, that Scufalos planned to purchase another tanker and that he wanted appellant to handle the processing of the loan since Scufalos was appellant's customer (R.1429). Spartalis advised appellant that the necessary details could be obtained from Costas Naslas who operated Tidal's offices here in New York. (R.1430). In this connection, it should be noted that Tidal operated, as agents for Scufalos, the two tankers which had been purchased by Scufalos and which were the security and purpose for the loan in December, 1971.(R.1570). While Scufalos had substantial experience in the operation of dry cargo vessels, he had virtually none in the operation of tankers. (R.246).

Appellant obtained the appropriate information from Naslas including the fact that the ship was chartered for one year to Agip, a substantial company and thereafter, for a period of three years to Montecatini Edison, a large Italian conglomerate.

The loan was submitted to the loan committee on the basis of this information and was approved. The loan offering sheet however, again failed to include the immediately preceeding loan to Scufalos and indicated that the total outstanding loans were approximately $4,000,000 even though only four months before a loan of $5,500,000 had been authorized to Scufalos for the purchase of the two tankers. Both Heine and Kwiatkowski testified that the procedure for checking on outstanding obligations was to call the Loan and Discount Department for short-term loans and the Nassau-Bahama branch for long term loans. (R.322,323,1063). Miss Kwiatkowski testified that the omission again was her fault and resulted from the fact the address listed for the two corporations which had purchased the two tankers in December was c/o Tidal Marine as a result of which, she did not pick the loan up as a loan to Scufalos' company. (R.1076,1077). Her statement is corroborated by Exhibit CP which is a memorandum from Heine directing that the new accounts for the two corporate owners of the Tropis and Tekton be opened with the address "c/o Tidal Marine". Scufalos and his companies are nowhere referred to.

On the question of appellant's intent and whether he, in fact, knew that the figure was understated and intentionally permitted it to remain understated, the court should be made aware of the fact that all loan records were available to the loan committee and frequently were called for by the loan committee. It would have been foolhardy for appellant to try

to deceive the committee on this point, particularly since there was no reason to believe that the loan would not have been approved based upon the correct figures. Moreover, this loan, reference to which had been omitted, was also a tanker loan and had been approved by the committee only four months earlier. It is unlikely that anyone would assume that nobody on the committee would remember it. Indeed, Bachman admitted that this prior tanker loan was discussed at the loan committee meeting when considering the loan before the committee. (R.739,740).

This misstatement was the basis for a charge of submitting a false statement contained in Count 74. Appellant was acquitted of this charge.

It is also the contention of the prosecution that when appellant submitted this loan for approval to the committee, he willfully failed to comply with an obligation to advise the committee of his knowledge of a problem that had existed with a charter on a Tidal ship on the security of which the bank previously had granted a loan. The prosecution asserts that because Tidal was going to be the operator of the Tagma, it was incumbent upon appellant to tell the committee what he knew, which they claim was that a non-existent charter had been represented as being in existence. Although appellant had nothing to do with that loan to Tidal, Shevlin testified that he told appellant about the problem with the charter.(R.895).

Appellant testified that he was told only that there was a problem which was being resolved. (R.1425-1427). He denied that he was ever told the nature of the problem. (R.1425-1427). Appellant did testify that Spartalis asked him not to discuss the problem with anyone outside the department, (R. 1426) but appellant nonetheless alerted Pat Martin, counsel for the bank, who then discussed the question with Shevlin and Spartalis outside appellant's presence. (R.1426). Martin confirmed this fact and testified that he discussed the matter with Spartales who satisfied him that it was being resolved.(R.606-612). Appellant contends, in any event that any problems experienced by Tidal, had no bearing on the question of a loan to Scufalos.

In any event, the loan was approved and appellant, because he had heard about a problem on a prior charter, requested counsel for the bank to check the charters on the Tagma. (R.1204-1206). Pursuant to these instructions counsel was retained in Italy to verify the charters by counsel for the bank. (R. 1205-1206). The Italian attorney reported by cable that the party to whom he spoke at Montecatini Edison had no knowledge of the charter but presumed that it was being handled by a

different division of the company. (Exhibit EN).

Appellant then communicated with Naslas who advised him that there was in fact a charter but that it had not finally been executed because negotiations were still pending for a better rate. (R.579,1436). Thereafter, Naslas advised appellant that because of difficulties in getting a better rate on the charter, efforts were being made to procure an alternative charter. (R.579,1436,1437). On two separate occasions names of alternative charterers were submitted to appellant for approval. (R.579,1437). In each case, appellant, after checking, refused to accept the charterers. (R.579,1438). With respect to one of the charterers, appellant communicated with Captain Leo Berger, another shipping customer and a good friend who testified as a character witness, who recommended that the charter not be accepted without a personal guaranty from the principal stockholder. (R.1437). When that guarantee was not forthcoming, appellant rejected the charterer. (R.1438).

When no further word was received for several weeks, appellant concluded that the transaction had aborted. (R.1438). In June, 1972, Shevlin called from London, where he had gone on other business, and advised that a subsidiary of P. Wigham-Richardson Co., known to appellant as a substantial

marine insurance company and appraiser was to charter the vessel.(R.1439). Appellant, unaware that P. Wigham-Richardson was engaged in the shipping business, indicated some doubts and made numerous inquiries including an inquiry of Captain Berger. (R.1440,1441). Having ascertained that P. Wigham-Richardson was indeed a substantial ship owner and ship charterer, having more than 100 ships on charter, appellant indicated his approval provided P. Wigham-Richardson guaranteed the charter of its subsidiary.(R.1440). He insisted on this requirement after consulting with counsel.(R.1441). The guarantee was procured and the loan was closed in London on June 16, 1972. Appellant was not present at the closing which was handled by Shevlin and counsel for the bank. (R.1443). Scufalos was present and signed a guarantee of the loan and a certificate to the effect that he was the sole stockholder of the owning corporation.(R.231,232).

Appellant has testified that he had approval of change of charterers from both Bachman and Spartalis. (R.1441, 1443). Indeed Shevlin told him Spartalis was insisting that the loan be closed.(R.1441). Bachman had no recollection of such a conversation.

Bachman testified that, in his opinion, any substantial change in the terms of a loan from those which were approved by

the loan committee should be approved either by the loan committee or by a superior officer. (R.707). He stated, however, that it was a matter of judgment whether or not a particular change was substantial enough to require such approval. (R.708). He stated that in his opinion, a change of charterer should be approved if it was a change of material significance, i.e., if a first class charterer was replaced by one of considerably less quality. (R.708). There was no evidence as to the financial status of P. Wigham-Richardson and nobody even hinted at the possibility that it was not an acceptable charterer which would have been approved if submitted.

Although there was nothing wrong with the charterer, the charter submitted to NBNA counsel at the closing, was not a complete document. An addendum to that charter which gave the charterer an option to terminate it at will, had been removed prior to its delivery. (R.1233). There was no testimony indicating how or by whom that addendum was removed or that appellant had any knowledge of its existence despite the availability as a prosecution witness of Shevlin who was in London when it was obtained.

Shevlin did testify that he told appellant that he was to receive a payment in connection with processing this loan. (R.950-960). Again, however, Shevlin also testified that he was not asked by Amanatides or Spartalis to do anything improper, nor did he request any improper conduct by appellant. (R.950-960). Furthermore, he testified that he would not approve any loan unless it was a good one. (R.950-960)

In reviewing the evidence relating to this loan, it is important to note that two of the three principal participants in the alleged scheme to defraud the bank, namely, Scufalos, who pretended to be the owner of the vessels when in fact, he was only a front for Tidal and Shevlin, who admitted to conversations with representatives of Tidal about payments and who admitted receiving payments both failed completely to testify at any point that Metzger had ever been told about any impropriety, had been asked to perform any wrongful act or had in fact, performed any wrongful act.

Subsequent to the Tagma loan, appellant, on July 16, 1972 approved three loans without submission to the loan committee. These loans are the subject of Counts 40, 41 and 42. In each case, appellant is charged with having willfully misapplied bank funds in connection with such loan. Although each of the loans

is the subject of a separate count and there are three separate documents or sets of documents representing these loans, in fact, the three loans were part of a single transaction.

On July 6, 1972, Scufalos and Amanatides visited appellant at the NBNA offices in New York. Scufalos came to New York at the request of Amanatides so that he could request a loan from appellant to be used to satisfy Tidal's need for additional cash. Scufalos said that although Amanatides was supposed to brief him on what to say to appellant, in fact, Amanatides did all of the talking. (R. 233-234).

Appellant testified that he was told by Scufalos that there were insurance premiums due on certain ships being operated by Tidal for Scufalos' companies and that checks which had been issued by Galaxy, a Tidal subsidiary to Scufalos' companies to cover these premiums could not be paid because there were insufficient funds in Galaxy's account. (R.1458). Scufalos therefore asked appellant to arrange for a loan to Galaxy to cover the checks. (R.1458). Appellant refused, but agreed to lend the money to Scufalos' companies and then have the funds deposited to the Galaxy account to

cover the checks which had been issued. (R.1458). Appellant knew and trusted Scufalos and was simultaneously aware that Tidal had problems. (R.1458).

Thereupon the three loans were approved and the proceeds deposited in Galaxy's account. (R.1458). Appellant obtained, as collateral, assignments of the charter hire on five vessels, three of them Scufalos' vessels and two of them, Tidal vessels. (R.1458-1460). A letter was procured from Tidal authorizing the use of the charter hire as collateral. (Exhibit EW). The loan was, in fact, repaid within thirty days from the charter hire as was scheduled. (R.1460). At the time the loan was made, a cable was sent by appellant to Scufalos' office manager in Greece indicating that a deposit had been made to cover the checks and that Scufalos was present in appellant's office. (Exhibit P).

It was apparently the position of the prosecution that this loan was improperly made because appellant was aware of the fact that Tidal Marine and Scufalos' companies were in financial difficulty. There was no evidence, however, to indicate that Scufalos' companies were in financial difficulty

There was no question, of course, that at that point in time, Tidal was experiencing substantial problems.

ARGUMENT

THE RELEVANT EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO ESTABLISH APPELLANT'S GUILT BEYOND A REASONABLE DOUBT

It is the contention of appellant that the evidence with respect to the four counts of the Indictment on which he was convicted was insufficient, as a matter of law, to establish his guilt beyond a reasonable doubt. In making this argument, appellant is fully cognizant of the rule of this Court that "the test is whether, taking the evidence in the view most favorable to the Government, there is substantial evidence to support the verdict." United States v. Tutino, (2d Cir.1959) 269 F 2d 488, 490. See also United States v. Manton (2d Cir.-1938) 107 F.2d 834, 839.

Appellant strongly urges that the evidence viewed in a light most favorable to the prosection, establishes, at most, that appellant may have been guilty of carelessness or questionable judgment. There is, however, no evidence to sustain the conclusion that in connection with the four loans as to which appellant was convicted he willfully and knowingly approved a loan transaction involving disbursement of bank funds with the intent to defraud or injure the bank.

The statute under which appellant was convicted, Title 18 U.S.C. § 656 provides in relevant part for criminal penalties for any officer, director, agent or employee of any national bank who "willfully misapplies any of the monies, funds or credits of such bank..." The section does not further define the word "misapplies". Although the vagueness of the description of the crime has withstood constitutional challenge, the courts have held that a basic element of the crime is an intent to injure or defraud the bank. U.S. v. Fortunato, (2d Cir. 1968) 402 Fed.2d 79, Cert. Denied 89 S.Ct. 1205, 394 U.S. 933; U.S. v. Giordano (2d Cir., 1973) 489 F.2d 327.

Moreover, it has been held that "willful misapplication" does not mean a mere act of maladministration, U.S. v. Meyer (CA Florida, 1959) 266 F.2d 747 Cert. Denied 361 U.S. 875; or bad judgment in making loans or transactions merely because they are prohibited, U.S. v. Mulloney, (D.C. Mass., 1934) 8 F.Supp.674, affirmed 79 F.2d.566, Cert. Denied 56 S. Ct. 383, 296 U.S. 658. In sum, it would appear that the crime is committed when a defendant or a bank officer acts in bad faith in making a particular loan or in causing the use or disbursal of bank funds. The gravamen of the offense consists in the evil dust with which the misapplication is made. Evans v. U.S. (1894) S.Ct.934, 153 U.S. 584.

In this case, there is not one word of testimony or one piece of evidence which would indicate an evil, malicious or criminal intent on the part of appellant. To the extent there is any evidence on the subject, it is entirely circumstantial and at most, from the point of view of the prosecution, is capable of a very strained inference of the requisite evil intent.

While it is recognized that this court has held that circumstantial evidence is permissible as a basis for a conviction and that it is not necessary that the inferences reasonably to be drawn from such evidence must preclude every reasonable hypothesis other than guilt, U.S. v. Grumberger and cases therein cited, 431 F.2d 1062 1970, it s appellant's position that the Court must nonetheless be satisfied, where the evidence is exclusively circumstantial, that the inferences of innocence are not so strong that a rational evaluation makes it impossible to conclude that a reasonable doubt does not exist.

What appellant contends for is a rule of logic rather than a rule of law. Where circumstantial evidence is as susceptible to an inference of innocence as it is to an inference of guilt, it cannot logically be said that guilt has been established beyond a reasonable doubt. A jury should not be

permitted to convict on the basis of inferences unless such inferences are sufficiently strong to preclude, not every other reasonable inference but every reasonable doubt. To permit a jury to convict on the basis of less substantial inferences is to permit the jury to speculate as to the innocence or guilt of a defendant.

In this case, the evidence with respect to the loans involved does not even give rise to an inference of guilt. At most it can be said that the facts established by the evidence are conducive to an hypothesis of guilt. In other words, while appellant, if he were engaged in criminal misapplication of bank funds, might very well have acted in the way that he did, it does not follow that conversely, his conduct gives rise to an inference that he was engaged in criminally misapplying bank funds. Virtually any conduct can be explained in terms of guilt. Let us now examine the facts which the prosecution contends give rise to an inference of guilt.

The Tagma Loan

As has been set forth in the statement of facts, in June, 1972, a loan was made to a corporation which had title to a ship known as the Tagma. The amount of the loan was $3,200,000. The loan had been approved by the loan committee of the bank on the basis of a loan offering sheet submitted by appellant which indicated that Scufalos was the customer involved.

There was testimony by Shevlin, one of the other officers in the ship loan department that he had told appellant that some sort of payment would be forthcoming in connection with that loan. Shevlin further stated, however, that he did not tell appellant what to do with respect to that loan and did not ask him to do anything improper. In fact, Shevlin said, he would not be a party to the granting by the bank of a loan which was not a good loan.

Thus, even if Shevlin's testimony on this subject be accepted (the jury completely disregarded his testimony with respect to the bribery counts), there would be no basis from his testimony to infer that appellant intended to or in fact did commit any fraudulent act in connection with that loan. The facts as presented to the loan committee were, so far as appellant knew, completely accurate, with the exception of the amount of the outstanding prior loans to affiliated corporations. With respect to this item, a loan of $5,500,000 which had been granted four months earlier had been omitted.

Even were we to assume that appellant could have been stupid enough to believe that he could fool the loan committee by omitting information about a $5,500,000 loan which they had approved only four months earlier and about which there was

discussion at the loan committee when the Tagma loan was being considered, the evidence fails to establish that appellant was in any way responsible for the error. As has been pointed out Miss Kwiatkowski, who did all of the typing in the department assumed complete responsibility for the error and it is inconceivable that she had any motive to lie. Some point was made by the Government of the fact that she subsequently left the bank and eventually became appellant's secretary at Irving Trust Company. However, her departure from the bank and employment by Irving Trust Company were not in any way coincident with appellant's departure. There is absolutely no basis for inferring solely from appellant's signature on the loan offering sheet that he noticed the error and intentionally submitted the offering sheet without correcting it. There was incidentally, no evidence to indicate that the loan committee, which was clearly aware of the fact that there were large loans outstanding to Scufalos, had any concern about the extent of those loans or would have rejected this loan if it had known the correct figures. The amount of the loan outstanding to the borrower was relatively unimportant except from an overall policy point of view. Since regardless of the number of other loans outstanding, each loan would have 1/3 of each month's charter hire to be used for debt service and the balance for oper-

ating expenses, it was relatively unimportant how much money had been borrowed from other affiliated corporations on other ships.

The prosecution further contends that appellant's evil intent may be inferred from his failure to advise the loan committee that, in connection with a loan to Tidal with which he had no connection, he had been told by Shevlin that a charter reported to be in effect was, in fact non-existent.

Aside from the fact that appellant denied knowledge of the fact that a charter was nonexistent, while admitting that he was aware of a problem, the testimony of Patrick Martin a bank attorney, established that appellant had advised him of the problem long before the time of the Tagma loan. Since Tidal was not appellant's account, since he had no relationship with the Tidal loan involved and since Tidal was not the borrower on the Tagma, there would seem to be no reason why appellant should have found it necessary to report his knowledge to the loan committee at that time. There is even less reason for concluding that his failure to do so was willful or evidenced a fraudulent or evil intent.

Subsequent to the approval by the loan committee, it is undisputed that appellant went to great pains to insure that the loan would not be granted without valid charters. He instructed bank counsel to retain Italian counsel to verify the

charter. Such an approach is hardly consistent with the existence of a criminal or fraudulent intent. Appellant, by checking carefully on the validity of the charter, was doing everything possible to insure a viable and valid loan transaction for the bank and making every effort to see that the bank was protected against fraud or damage.

This brings us to the final fact relied upon by the prosecution, namely the substitution of charterers. It is the prosecution's position that, having discovered a problem with the Montecatini Edison charter, appellant had no authority to permit the substitution of a different charter. This position is based upon the testimony of Bachman to the effect that where there was a substantial change in the terms of a loan, such change could not be effectuated by the lending officer, but required the approval either of the loan committee or of a superior. Bachman further stated, however, that the question of what constituted a substantial change was a matter of judgment and a change from one good charterer to another good charterer would not require approval. Incidentally, neither Bachman or any other witness indicated the slightest dissatisfaction with P. Wigham-Richardson as the substitute charterer, or that such charterer would not have been approved by the loan committee or Bachman if they had been made aware of it.

Appellant, of course, has testified that he did get Bachman's approval as well as the approval of Spartalis, his immediate superior, who was both an Executive Vice-President of the bank and Vice-Chairman of the loan committee. While Bachman does not recall any such discussion, there is no evidence to refute appellant's statement that Spartalis approved and indeed insisted that appellant proceed with the loan.

However, even if appellant proceeded without approval, such conduct could not, by any stretch of the imagination be considered fraudulent.

The difficulty which arose because counsel was given an altered charter at the closing was in no way shown to have been with the knowledge or participation of appellant. Although Shevlin who testified as a prosecution witness was present at the closing in London, he was asked no questions about this charter. Nor was Scufalos who was also present in London.

In the absence of any evidence to establish that appellant's approval of this charter did or even could subject the bank to injury or damage, it cannot be said that evidence of failure to seek approval from his superiors, if believed, indicated an intent to defraud.

On the contrary, the evidence established that appellant went to great pains to insure that the bank did not suffer any damage. He did not close the loan until he was

satisfied that P. Wigham-Richardson was a substantial charterer. Previously, when the names of two other charterers were submitted to appellant as substitutes, they were rejected after appellant made inquiry and ascertained that they were not sufficiently viable financially to be satisfactory to the bank.

It would thus appear that on the basis of the circumstantial evidence from which the prosecution seeks to infer appellant's criminal intent, the only reasonable inference is that appellant did everything in his power to insure that the bank would not be defrauded or damanged. To permit a jury to draw a contrary inference would defy logic.

A reversal of the conviction on that count, Count 77 is accordingly required.

The Short Term Loans

The other three counts of the indictment of which appellant was convicted charged him with willful misapplication of bank funds in connection with the three short term loans made to three corporations operated by Scufalos. Each corporation was already indebted to NBNA on ship mortgage loans which were secured by assignments of charter hire as well as the mortgages.

All three loans were made on the same day and as part of a single transaction. All three loans were secured by the charter hire on the three vessels plus the charter hire on two additional vessels owned by Tidal.

The evidence with respect to these counts is extremely limited and for the most part consists of the testimony of appellant himself. According to appellant he was approached in or about July 6, 1972 by Scufalos and Amanatides. He was told by Scufalos that approximately $365,000 was needed as a loan to Tidal because Tidal, which was operating Scufalos' tankers had issued some checks for purposes of providing funds for insurance premiums on Scufalos' vessels, but did not have sufficient funds to cover the checks. Appellant refused to make the loan to Tidal but agreed to make the loan to Scufalos' corporations with a guarantee by Tidal and further agreed to have the proceeds of the loan deposited in the account of Galaxy Steamship Co., a Tidal subsidiary, to enable Galaxy to cover the checks it had issued to Scufalos' companies.

As soon as the loans were made, Scufalos' office in Greece was notified of that fact. The funds were deposited to the account of Galaxy and the bank received an assignment of the charter hire on the three Scufalos vessels as well as the two Tidal vessels. As has been

pointed out previously, the assignment of charter hire, even though there was already an assignment to cover a long term ship mortgage, did provide funds for the payment of the short term loan since only one-third of the charter hire was required each month for the payment of the long term mortgage. Two of the ships which were covered by this assignment were the Tropis and the Tekton which were oil tankers on five year charter to BP Petroleum, a charter which was one of the best in the bank.

Because Tidal was operating these ships and was in financial difficulties, appellant notified his subordinates to be absolutely certain that under no circumstances were those freights to be diverted from repayment of the short term loans after the deduction of that portion necessary for the long term loans. The freights were in fact received and were used to pay the loan at the expiration of the thirty day period of the loan.

The only testimony other than appellant's was that of Scufalos and Shevlin. Scufalos testified merely that he had been requested by Amanatides to come to the United States in order to make a request of appellant for a loan because Tidal needed some cash and Amanatides could not make the request. Scufalos said that he made a special trip to the United States for this

but that it had been unnecessary for him to say anything because Amanatides did all of the talking. It seems quite clear that if appellant had really been aware of the relationship between Scufalos and Tidal, it would not have been necessary for Scufalos to fly to the United States from Greece for the sole purpose of asking appellant to lend money to Tidal.

Shevlin testified that appellant came to him and said that money was needed to pay Scufalos' partners or they would blow the whole thing up and that appellant approved the loan, saying that it was for the purpose of paying trade payables. Shevlin said that he told Metzger that the whole thing was crazy and he didn't want to know anything about it.

Shevlin's testimony not only conflicts with appellant's testimony and with the facts since there was no indication on any loan application that the loan was for the purpose of paying trade payables, but more important it conflicts with the testimony of Scufalos who was also a prosecution witness.

Moreover, Scufalos' testimony makes Shevlin's inherently incredible. Shevlin's testimony to be true requires the conclusion that appellant knew about the relationship between Scufalos and Tidal. Such a conclusion is belied by the fact that Amanatides found it necessary to have Scufalos travel to New York from Greece, in order to approach appellant.

Further support for the conclusion that appellant was unaware of the relationship between Scufalos and Tidal may be derived from Shevlin's description of a meeting in May or June 1972 at which ostensibly Shevlin, appellant and Spartalis were advised of Tidal's problems. During the course of that meeting, according to Shevlin, one of the principals of Tidal said to appellant that his help was necessary because if anything happened to Tidal, Scufalos would also have problems. If, in fact, appellant knew that Scufalos and Tidal were connected such a statement would have been pointless.

In any event, even if Shevlin's testimony is accepted it is not evidence of misapplication of bank funds. The loans were perfectly good loans. The funds were completely secured and were repaid within the thirty days as scheduled. At the worst, accepting the testimony of Shevlin, even though it is at odds with all of the other testimony in the case, it may be concluded that appellant authorized the loan with the knowledge that the proceeds were to be used to assist in consummating the ship sale by Scufalos to Tidal.

The loan was in all respects a viable one. It was more than adequately secured and was paid when due. Where is the intent to defraud or damage the bank? It is not a prerequisite to the making of a loan that a particular purpose be served by

that loan. The primary consideration in making a loan is that it be secured or its repayment assured in some manner sufficient to satisfy a reasonably prudent businessman. Those criteria were met by this loan.

The Government may contend that the willful misapplication results from the fact that the loan exceeded appellant's alleged loan limit. As has been pointed out at great length previously in this Brief, however, regardless of what the policy of the bank may have been in other departments, it clearly was not the policy followed in the ship loan department. Even Shevlin admitted that never had that policy been followed in the prior four years and that to the knowledge of everyone in the department short term loans in excess of supposed lending limits were made on a regular basis on the authority of Spartalis.

The schedule of short term loans indicates dozens of short term loans over a period of years, none of which ever were cleared through the loan committee. Indeed, according to Bachman and Jones, with the possibility of one exception over a period of a number of years, there was no record of any short term loan in the ship loan department ever having been approved by the loan committee.

Thus, whether or not appellant was technically authorized to make the loan, it can hardly be said that his compliance with

the rules of his department as established by Spartalis constituted a willful misapplication of bank funds because it evidenced an intent to defraud or damage the bank.

In conclusion, appellant's conduct must be evaluated in the light of the knowledge available in 1971 and 1972, and in the context of a ship loan department which was extremely successful.

The operations of that department had been lauded at great length in the annual report of the bank and appellant as well as everyone at the bank considered the department a shining star. Spartalis, as Bachman testified had a very special relationship with the President of the bank and had a fair amount of autonomy. There was absolutely no reason for appellant at any time to question Spartalis' integrity or the propriety of Spartalis' orders.

By the same token, appellant had no reason to be suspicious of Scufalos. Scufalos, as has been pointed out, was a graduate of the Merchant Marine Academy, a very well respected ship owner and a close friend of the son-in-law of the Chairman of the Board of Directors of the Bank. Scufalos played his role, as he admitted, pretending to be the owner of the vessels. With respect to the Tagma, he even signed a certificate acknowledging that he was the sole stockholder at the same time as he signed a guarantee of the obligation of the Tagma.

Thus, even if it may be said that Metzger was overly concerned about the problems of Scufalos' companies, and leaned over backwards to assist Scufalos, the circumstantial evidence when viewed in its worst light, without the benefit of hindsight, does not reasonably lead to the conclusion that appellant's conduct was criminal in nature--that appellant knowingly participated in a fraud on the bank--that appellant was guilty of willful misapplication of bank funds with the intent to defraud or damage the bank.

CONCLUSION

The conviction below should be reversed.

Respectfully submitted,

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